IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 175

INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellants,

vs.

INLAND WATERWAYS CORPORATION, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF IN BEHALF OF APPELLEE, A. L. MECHLING, DOING BUSINESS AS A. L. MECHLING BARGE LINE.

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Opinions Below

The findings of fact and conclusions of law of the three-judge District Court (R. 1663-1676) are reported at 44 Fed. Sup. 368.

The majority and minority reports of Division 2 of the Interstate Commerce Commission are included in the record (following R. 18) and the majority and minority reports of the full commission is also included in the record (following R. 47). These reports appear respectively in 246 I. C. C. 353 and 248 I. C. C. 307.

Jurisdiction.

Jurisdiction rests on the Urgent Deficiencies Act, October 22, 1913, C. 32, 38 Stat. 208 (28 U. S. C. A. 47, 47a) and Section 238 of the Judicial Code, as amended (280 U. S. C. A. 345). The final decree below was entered April 16, 1942 (R. 1677); petition for appeal was filed and allowed on May 21, 1942 (R. 1679, 1681). Probable jurisdiction was noted by this court on October 12, 1942.

Questions Presented.

The rail service for taking grain east from Chicago is the same, regardless of how the grain got to Chicago. For years the eastern rails have charged for that service "proportional" rates (lower than local rates) regardless of whether the grain came to Chicago by rail, by lake steamer, or by river barge reaching Chicago via the Illinois Waterway. The eastern railroads proposed to cancel their proportional rates on all grain that had been brought to Chicago via the Illinois Waterway regardless of origin—continuing these proportional (lower) rates in effect, however, for grain brought to Chicago by rail and by lake steamer.[1]

The Commission held this lawful. The specially constituted District Court enjoined the order.

Did the Commission err in holding that the rate proposal in question violated Sections 1, 2 and 3 of the Interstate Commerce Act as amended, and did the Commission nevertheless have administrative discretion to hold that it did not?

Did the Commission discharge its full duty under Sections 6(11)b and 15(7) of the Act, and, if not, did the Commission nevertheless have administrative discretion to hold that it did?

1. And also continuing proportional rates on alfalfa meal brought from one point by one barge line.

Did the Commission make findings required to support its order?

Did the Commission take into consideration as justifying its order matters that did not do so, that had no rational tendency to support its order, and that it had no right to consider?

Is the finding that if the rate proposal became effective the barge-rail movement would not be prohibited, supported by the evidence?

Did the Commission fail to make findings and take evidence necessary to support its order under the National Transportation Policy and Section 3(4)?

In refusing to permit appellee to offer evidence addressed to the new statutory situation created by the amendment of the Act by the Transportation Act of 1940, and appellee's new status thereunder, did the Commission deny appellee a fair hearing as required by the statute, or as required by the due process requirement of the Federal Constitution, or act arbitrarily?

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STATEMENT.

The Established Rates and the Traffic.

Grain[1] comes to Chicago[2] by rail, by lake steamer, and by barge on the inland waterways.

After coming to Chicago this grain moves on east from Chicago by rail. (R. 18; 246 I. C. C. 353, 383-4.) Part of it goes east by lake during the seven months of open lake navigation. (Idem.)

The record shows in tabular form the quantities moving into and then out of Chicago, and the modes of transportation employed for the in-movement and the on-movement. (R. 18; 246 I. C. C. 353, Appendix I.)

It is a matter of common knowledge that this movement of grain to the Chicago market, and thence east constitutes one of the conspicuous "streams" of interstate commerce; the table mentioned gives it statistical definition as to corn, wheat, oats and soybeans.

The rates in question are rail rates for the movement of grain east from Chicago. The nature of rates that are and for years have been in effect, is stated by the District Court in the first finding. (R. 1663.)[3] Essential facts there appearing are that the established rail rates for the on-movement from Chicago include two general kinds of rates, "local" and "proportional"; and that the *local* rates are in all cases *higher* than the proportional. These "proportional" or "reshipping" rates[4] (lower than "local" rates)

1. "Grain" as used herein means grain, grain products and soy beans.

2. Other reshipping points in the Chicago region are involved. Chicago dwarfs the rest and was treated by the Commission as fully representative. Chicago is one of the great grain reshipping points of the world. (R. 18; 246 I. C. C. on 383-4.)

3. We do not find that appellants challenge this finding.

4. By virtue of the suspension of the proposed change in these rates and the agreement of the eastern rail lines who had proposed to change them, these established rates are still in effect, pending the outcome of this proceeding.

apply on grain that has been transported into Chicago from beyond. They apply to the on-movement east from Chicago.

The rail *service* for the on-haul east from Chicago of this re-shipped grain is the same—whether it came to Chicago by rail, by barge, or by lake steamer. (R. 54.) And the rail *rate* for the on-haul has been a proportional rate for years prior to the present proposal—regardless of whether the grain reached Chicago by rail, barge or lake steamer. (R. 1663; Finding 1.)

The Chicago elevators receive this grain as it comes in by rail, by lake steamer, and by river barge. From the Chicago elevators it goes east.

In order to engage the proportional (lower) rate level for movement east from Chicago, it is not required that the identical kernels of inbound grain be identified; the grain is all mingled in the elevators. This is true to an identical degree of grain brought in by barge, rail and lake steamer. It is required in order to engage the proportional rate for outbound shipment that the shipper shall show and surrender to a policing agency (called the Central Weighing and Inspection Bureau) inbound billing covering an equivalent amount of grain of the same kind that he is shipping east. This true of grain that has come to Chicago by rail, barge or lake steamer.

The Proposed Change in Rates Here in Question.

In this situation eastern railroads transporting grain east from Chicago proposed to change the established rail rates for the on-haul of grain that had been brought to Chicago. The nature of the change lies on the face of the schedules. It was stated by Commissioner Alldredge when the case was before Division 2 of the Commission:

> "If the suspended schedules should become effective the situation would then be that the present proportional rates would continue in effect on grain brought

> to Chicago by rail and by lake vessel, but the higher local rates would apply on grain brought in by barge over the Illinois waterways." (246 I. C. C. 353, 382; R. 18.)

This was also the finding of the Commission, which refers to

> "• • • the fact that under the proposed schedules the ex-barge rates will be higher than the ex-rail or ex-lake rates although in each instance the physical carriage beyond the reshipping point will be substantially the same." (R. 54.)

This was also the finding of the District Court (Finding 24; R. 1674):

> "If the proposed rates become effective, ex-barge grain will pay a greater charge upon re-shipment from Chicago to eastern destinations than will ex-rail or ex-lake grain, although the railroad services rendered east of Chicago will be identical upon the reshipment of grain in all three categories."

Some language of Division 2 suggests that the proposal was there treated as though it relates only to rates on corn. This was not treating the proposal for what it is. There is no dispute that it relates to practically all kinds of grain, grain products and to soybeans. The fact again lies on the face of the proposed schedules.

The language of the proposed schedules was in form aimed at grain coming in over the Illinois Waterway, and both Division 2 and the Commission refer to grain arriving via the Illinois Waterway. (R. 18; 246 I. C. C. 253; 47.) The Illinois Waterway, as the map shows, is the link connecting the whole inland river system of the continent with Chicago. The record shows that grain comes to Chicago by barge from as far west as Kansas City on the Missouri River, as far south as New Madrid, Missouri, downstream from St. Louis, and as far north as Burlington, Iowa. (R. 1707, 1708; Ex. Vol., p. 101; 1722. Cf. Sec-

tion 309.) The chairman of the Commission said (the portion in parenthesis is supplied):

> "It is now proposed to cancel the application of these rates (viz., the established and presently effective proportional rate) on ex-barge traffic, even if it comes from such comparatively distant points as Kansas City and St. Louis, regardless of the length and nature of the inbound haul." (R. 73.)

Congress has spent millions in the improvement of our inland waterway system for navigation.[1]

On the Illinois River and Waterway alone, the investment of public money is about $60,000,000. (R. 18; 246 I. C. C. 353, 355.) River navigation for such cargo is by means of strings of barges moved by towboats. This elimination of navigation difficulties has made barge transportation of grain to Chicago commercially important. (Appendix 1 of the report of Division 2; R. 18; 246 I. C. C. 353, 358.)

The barge rates into Chicago are lower than the rail rates. The result is that farm producers having access to river transportation get more for their grain; Division 2 so found. (R. 18; 246 I. C. C. 353, 361.) One of the inherent advantages of water transport is low cost.[2] The benefit of low cost river transportation goes to the grain producer in the country. The Chicago buyer gets none of it. He pays the Chicago price, less the cost of bringing the grain to Chicago.[3]

The proposal is, as stated, to give, or withhold, the benefit of proportional rates going out of Chicago, depending on whether the grain comes in to Chicago by barge, or by rail.

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1. These appropriations have been made over a period of years by Public Acts of Congress of which this court has judicial knowledge.

2. Cf. legislative history of the River and Harbor Acts, and of the Transportation Act of 1940, hereinafter mentioned. The Inland Waterway Corporation was formed by Congress to develop low cost river transportation for the benefit of the public.

3. Appellants do not dispute this.

The eastern lines who propose this change in the established rate structure for the movement of grain east from Chicago put only one witness on the stand. (W. T. Tannehill.) He was cross-examined as to the reason why the railroads proposed this change in their rates, and left the subject here:

> "We made this proposal as I have stated several times, and filed these tariffs with the hope that we could drive this business off the water and back onto the rails where it belongs. * * *" (R. 266, 267.)

The nature (and amount) of the proposed charge bear no rational relation to any other purpose than that for which it was made—to "drive the business off the water and onto the rails." The Chicago buyer does not know to what eastern customer he will sell. But if he has to impose on his customers a higher price because he brought his grain to Chicago by barge, he is out of the market; a margin of a quarter of a cent will determine whether he or his competitor will get the sale. (R. 1635, 1558, 1618.) And the higher cost he would be forced to impose on his customer merely for having brought his grain to Chicago by barge would be from 1.5 cents to 7.5 cents for his customers in Central Territory, and 8.5 cents to New England and Eastern Trunk Line Territory—if the proposed schedules become effective. (R. 52.)

There is one exception to what has been said. The proposed schedules single out one product, from one point, when brought to Chicago by one barge line, and offer it the benefit of proportional rates east from Chicago, viz., packaged grain when brought from Kansas City by the Federal Barge Line.[1]

1. R. 1274; item 3622 of Federal Barge Lines Freight Tariff, No. 31-J I. C. C. No. 148; Exh. 1, p. 7 for the trans-Mississippi application; p. 22 for note 20 application; R. (ex. vol.), pp. 7, 22. Alfalfa meal, a grain product has moved on these rates. This application of proportionals will not apply otherwise; e. g., to wheat which has been shipped to Chicago from Kansas City. (R. Exh. 63; Ex. Vol. 101.)

Summarizing: The differentiations in rate treatment thus proposed by the eastern railroads are:

(1) Ex-barge grain and grain products shall pay the local rate, (viz., pay more) for shipment east from Chicago than ex-rail grain, regardless of the length and nature of the inbound haul:

(2) Ex-barge alfalfa meal transported to Chicago from Kansas City by any other barge line than Federal Barge Line shall pay more for shipment east than the same commodity brought in from the same point by Federal Barge Lines.

(2) Ex-barge grain shall pay more than ex-lake grain.

The Case Before Division 2 and the Full Commission.

Upon petition of various parties the commission exercised its powers under Section 15 of the Interstate Commerce Act and ordered a hearing on the proposed new rates. (R. 15.)

The established rates were not in issue. (R. 15.)

Initially the case came before Division 2 consisting of three commissioners, two of whom joined in a report most of which is devoted to an involved argument to the effect that the established tariffs, properly construed, never had applied to ex-barge grain. The third commissioner, dissenting from this departure from the matters set for hearing into the realm of construction of tariffs not in issue, found the proposed schedules to be unlawful. (R. 18; 246 I. C. C. 353.)

The eastern railroads who had made the rate proposal in question asked the full commission to reverse Division 2 with respect to the construction of their established schedules (R. 57), and the Commission did so, holding that under the established schedules proportional rates applied on ex-barge grain.[1] (R. 51, 52.) But the Com

1. The railroads had applied them to ex-barge grain for years. No question of tariff construction is raised here. (R. 51, 52.)

mission denied the petitions (R. 48) of shippers and a barge line and held that the proposed schedules abolishing the application in the future of proportional rates to ex-barge grain (while continuing them as to ex-rail and ex-lake grain) "cannot be condemned as unlawful under Sections 2 and 3 of the Act." (R. 55.) Four of the commissioners dissented. (R. 55, 76.)

The two commissioners who made the majority report of Division 2 point out that, before the present rate proposal was made, the western rails who compete with the barge lines for the inbound haul to Chicago have been publishing intrastate rates applying from some Illinois shipping points accessible to river transportation, which were lower than the interstate rates from the same points. The interstate rates from these water competitive origin points, for grain shipment to Chicago, were "said to be (sic) the normal basis reflecting the national grain rate structure." Division 2 follows this statement with a table. The table shows these intrastate rail rates to Chicago, lower than the interstate rates. (R. 18; 246 I. C. C. 353, 356.)

The rails put in these low intrastate rates (with authority only of state regulatory bodies, which could not authorize transit in interstate commerce) to get the business away from the barge lines; or, in the language of the report, to meet barge competition. But these low intrastate rates failed of their purpose. Division 2 says:

> "*Position of the western rail lines:* These lines maintain that the purpose of establishing the intrastate rates on corn, under which transit is prohibited, was to meet unregulated[1] barge competition. The practice of respondents[2] in permitting transit and the

1. The barge carriers were unregulated when the present rate proposal was made. But when the report of Division 2 was written they were regulated carriers under Part III of the Interstate Commerce Act, enacted by the Transportation Act of 1940.

2. The eastern rail lines who made the proposal here in question to deny proportional rates to ex-barge grain.

> application of the proportional rates east of Chicago has had the effect of nullifying the western lines' efforts." (246 I. C. C. 353 on 364.)

The purpose of this proposal to deny the application of proportional rates east of Chicago on ex-barge traffic was, admittedly, to drive the inbound barge traffic "off the water and back onto the rails." It was not made by the Commission. It involves a change in established rates.

Division 2 (not the Commission) referred later to the breaking down of the (rail) grain rate structure, as follows:

> "The western lines, supported by the eastern line respondents, also contend that if application of the proportional rates is to be continued on unregulated (sic) ex-barge traffic, the result will be a breaking down of the established through grain rate structure from west to east. The evidence already detailed *with respect to* the inability of the reduced intrastate rates on corn to accomplish their purpose in meeting the competitive barge charges supports this contention." (Our emphasis.) (246 I. C. C. 353 on 365.)

When the Division speaks of breaking down the (rail) grain rate structure by continuing proportionals on ex-barge traffic, it here says that in terms of the actual evidence, the thing it is talking about is this behavior of the rails in publishing intrastate rates "said to be" below the interstate rail rate base in order to get the business away from the barge lines. The remark of Division 2 concerning the breaking down of the grain rate structure, understood in terms of the evidence and record as stated by the Division is this: that the rails have yielded to the temptation to publish low rail rates in their efforts to eliminate barge line competition.

The only way hitherto suggested by which this temptation is to be removed from the rails by the present rate

proposal, is the way frankly stated by the rails themselves who made the proposal—viz., to "drive the business off the water and back onto the rails." That phenomenon, which the Division called breaking down the (rail) grain rate structure, would be eliminated—only to the extent that the barge lines were eliminated from the business.

Division 2 ignored Section 3(4) of the Interstate Commerce Act as amended, the new National Transportation Policy, and the fact that water carriers had by law been brought under the Commission's jurisdiction. It says:

> "Under the Interstate Commerce Act as amended September 18, 1940,* Section 3(1) of Part I, undue discrimination, prejudice or disadvantage by rail carriers to traffic of any other carrier, by water for example, is not unlawful. Part III of the Act, applicable to water carriers is substantially the same. *It follows* that the prejudice alleged by the barge line, even if it existed, is not unlawful." (Our emphasis.) (R. 18 *et seq.*; 246 I. C. C. 353 on 363.)

Upon this analysis the Division concluded that the rate proposal in question, which would charge more for taking grain on from Chicago when it had come there via the barge lines, was "not shown to be unlawful." (R. 18 *et seq.*; 246 I. C. C. 353 on 363.)

On review of the report of Division 2, the Commission said nothing about "breaking down the grain rate structure." It said:

> "The proposed schedules will not prohibit the movement by barge-rail even to trunk-line territory, their principal commercial effect being to reduce the profits of the Chicago elevator operators." (R. 53.)

Division 2 did not so find; on the contrary, it found (as above quoted from its report) that the existence of water competition was tempting the rails to quote intrastate rates for grain said to be below the interstate rail base

* By the Transportation Act of 1940.

in order to get the business from the barge lines; that this effort had failed because ex-barge grain had proportional rail-rates out of Chicago; that the proposal to abolish these proportionals on ex-barge grain (at the same time leaving them in effect as to ex-rail grain) was not contrary to Section 3(1) of the Act as amended in 1940, and that *it followed* that it was not unlawful (ignoring Section 3(4)) of the Act as amended in 1940.

The Commission nowhere said that this rate proposal would not gravely injure and diminish the barge-rail movement. There has been no such contention.[1]

The full Commission dealt with the question of discrimination as follows:

> "Protestants maintain that the proposed schedules will be unreasonable, unjustly discriminatory * * *.[2] This is based primarily on the fact that under the proposed schedules the ex-barge rates will be higher than the ex-rail or the ex-lake rates although in each instance the physical carriage beyond the reshipping point is substantially the same. But the latter is also true of local grain, grain brought in by truck, or by rail under interstate rates, or grain which has forfeited its transit privileges.[3] To adopt protestants' premise would mean that all proportional rates lower

1. As appears below, we think that a finding that the barge-rail movement would not be *prohibited* by this diffegent rate treatment of ex-barge grain does not support a conclusion that the proposed rate treatment of ex-barge grain is not *discriminatory*. It is unquestioned that it would gravely injure and diminish the barge-rail movement. (See evidence in summary in the brief for Inland Waterways Corporation, *et al.*, Appendix B, pages 117-121. To the facts there set forth should be added the fact that the eastern lines, their witness said, made this proposal with intent to "drive this business off the water and back onto the rails," etc. (R. 296.)

2. Section 3(4), prohibiting interline discrimination drops all such qualifications as "undue" or "unjust" or "unreasonable" found in other provisions of the act; it prohibits "discrimination."

3. Ex-barge and ex-rail grain is treated *alike* in all these respects by present schedules. As to ex-truck grain, Congress made no such provision forbidding discrimination against it as it made forbidding discrimination against ex-rail grain. (Sec. 3 (4).) If there were discriminations against ex-truck grain in favor of ex-rail grain in existing schedules that were not in issue, the Commission does not point out how this would justify a further discrimination against ex-barge grain (also in favor of ex-rail grain) in proposed schedules that were in issue.

than local rates and differing from each other according to the origin of the commodity would have to be condemned." (R. 54.)

The culminating sentence of this analysis of the law assumes that the proposed schedules, which the Commission was asked to condemn, were for proportional rates "differing from each other according to the origin of the commodity." But the proposed elimination of the proportional rates instead of being to adjust these proportionals to the origin of the commodity, was to cancel all proportionals for ex-barge traffic—regardless of the origin of the commodity or the length and nature of the in-bound haul; to continue them for all ex-rail traffic, still regardless of the length and nature of the in-bound haul—a fact that lies on the face of the proposed schedules and was not susceptible of conflicting evidence. The Chairman of the Commission stated as to the proposed schedules:

> "It is now proposed to cancel the application of these rates to ex-barge traffic, even if it moves from such comparativeiy distant points as Kansas City and St. Louis, but to continue to apply them to ex-rail and ex-lake traffic regardless of the length and nature of the inbound haul." (R. 73.)

As he further points out:

> "After the proposed schedules take effect, the re-shipping rates will cease to apply, with very minor exceptions, on all ex-barge grain, but will continue to apply, as above indicated, on all ex-rail and ex-lake grain." (R. 70.)

The proposal in fact (contrary to assumption upon which the Commission sustained it) is not to adjust the proportional rates according to the length and nature of the inbound haul, or to the total overall length of the "through" transportation; it is to give or withhold the benefit of proportional rates going east according to whether the rails or the barge lines got the business on

the in-haul to Chicago—regardless of the length and nature of the inbound haul.

In this connection falls the further finding of the majority of the Commission:

> "To trunk-line territory, the inbound barge movement represents a very small proportion of the total haul. The distance from Morris to Chicago by river, 57.5 miles, plus 880 miles rail short line to New York is 937.5 miles. The water portion of the haul is but .06 per cent." (R. 52.)

When the inbound movement from Morris is by *rail* then the same remarks apply to the rail movement—but under the proposal, that ex-rail grain from Morris would take a proportional rate to New York, whereas the ex-barge grain *from the same point*, would have to take the higher local rate.

The same is true of every origin point; viz., under the proposal the ex-barge grain is denied a proportional rate on from Chicago, but ex-rail grain *from the same origin* would get a proportional rate.

The majority of the Commission says that "the barge-rail combinations" will be 1.75 cents higher than all-rail under the proposed schedules. (R. 53.) It is uncontradicted that the grain business of dealers on the Chicago market who sell to eastern customers is done on margins of a quarter of a cent a bushel, that is a quarter of a cent will affect a sale. (R. 1635.)

The Commission points out that under the proposal the "barge-rail combinations" to parts of Central Territory will be lower than all-rail. (R. 52.) In this connection undisputed facts in the record pointed out by Chairman Eastman are:

> "The table on page 361 of the prior report* shows clearly that the farmers are paid the Chicago market price less the 'costs incident to making delivery at

* Record 18, 246 I. C. C. 353, 361.

Chicago;' which consist mainly of the transportation charges. It follows that the farmers whose grain can be transported by barge receive the benefit, in the prices paid for their grain, of the low barge rates, and that this benefit does not go to the Chicago elevator operator. For this reason ex-barge grain has exactly the same value in the elevator as ex-rail or ex-lake grain, and naturally it will not be moved eastbound on local rates when ex-rail or ex-lake grain can be moved at the much lower reshipping rates.

"While it is true to some extent, that the combination of the barge rate to Chicago plus the local rate east-bound is lower than the combination of the rail rate from the same origin point to Chicago plus the reshipping rate east-bound, this fact will not enable the ex-barge grain to move from Chicago on the local rate,[1] because the benefit of the low barge rate now goes to the farmer and cannot be used by the elevator operator to offset the higher level of the local rates as compared with the reshipping rates. In other words, the grain is brought by the Chicago elevator operator and is shipped thereto without knowledge of where it will go after it reaches Chicago, and the through combination rates to eastern points do not enter into the transaction." (R. 70, 71.)

The Commission found at another point in its report:

"The proposed schedules will result in increases in the barge-rail combinations of 1.5 to 7.5 cents to central territory, and in a uniform increase of 8.5 cents to trunk line territory." (R. 52.)

Appellee, A. L. Mechling, Doing Business as A. L. Mechling Barge Line.

Appellee is in the business of bringing grain to Chicago by barge via the Illinois Waterway from points on the Mississippi River between and including New Madrid, Missouri,[2] and Burlington, Iowa, and also from points

1 The only rate allowed ex-barge grain by the proposal

2 About 70 miles below St. Louis, Missouri

located on the Illinois River and Waterway. (R. 1722.) The amounts are large, amounting to over seven million bushels in 1939. (R. 357.)

When the present rate proposal was made, Part III of the Interstate Commerce Act had not been passed; the hearing of evidence before the Commission ended on January 26, 1940. (R. 1662.) The Transportation Act of 1940 was approved on September 18, 1940.

This appellee appeared as a witness at the hearing at the instance of counsel for the Western Railroads. (R. 906, 210.) He was not a party, nor represented by counsel. (R. 906.) He had not been held to be a common carrier subject to Part III because Part III had not been enacted when the evidence was taken. (R. 1662.)

Both these provisions of the law were enacted and effective before the case came before Division 2. In a collateral proceeding appellee was held on November 6, 1941 (by Division 4 of the Commission), to be a common carrier, subject to Part III. (R. 1721.) He was therefore bound to file rates, as distinguished from the schedule of minimum charges filed by contract carriers. (Section 306.) Prior to the decision by the Commission on review of Division III, he filed his rates, a fact of which the Commission took official notice. (R. 49.) The order of Division 4 of the Commission in the collateral proceeding finding appellee to be a common carrier subject to Part III is in evidence. (R. 1721.) Appellee's right to engage in transportation was limited by the Commission to grain and soybeans. (R. 1724.) Division 4 found, as to appellee's transportation of these commodities:

> "After reaching destination the commodities generally continue movement by rail or water carriers to points in other states or to foreign countries." (R. 1722.)

The division further found:

> "Applicant furnished transportation by barge, and

we will limit his service to that type of operation." (R. 1723.)

After appellee had been found to be a "common carrier subject to Part III" (Section 3(4)) he asked leave to intervene before the Commission and present evidence in support of his contention that the rate proposal, if allowed to become effective, would be in derogation of his rights as a common carrier subject to Part III, under Section 3(4) and the new National Transportation Policy, and his constitutional right to a hearing on those new issues before they were decided. (R. 95-100; original record, 172 *et seq.*) The Commission denied his application. (R. 1724.)[1]

The Commission never took any evidence addressed to the issue under Section 3(4) as amended, or the National Transportation Policy. The record before the examiner on the facts was closed before those provisions became effective (R. 1662) and never reopened.

1. Counsel for the Commission is in error in stating that prior to the report of Division 2, Federal Barge Line was the only common carrier bringing grain to Chicago by barge and that the rest were contract carriers. (Br. p. 54.) The finding that Mechling was a common carrier subject to Part III was made on November 6, 1941. (R. 1721.) However, it was predicated on a finding under the "grandfather" clause of Section 309 that Mechling was a common carrier on January 1, 1940. (R. 1722.) The report of Division 2 is dated July 31, 1941. Counsel for the Commission are in error also in stating that the Transportation Act of 1940 became effective after the report of Division 2. (Br. p. 54.) John I. Hay Co. (R. 18, 246 I. C. C. 353, 357) has recently been held to have been a common carrier on January 1, 1940.

SUMMARY OF ARGUMENT.

The rate proposal was in violation of Section 3(4) as amended.

The Commission, in defending its order under Section 3(4) on brief here, ignores the discrimination in favor of incoming railroads against incoming barge lines. It depends on an early case in this Court decided before the recent amendments of Sections 3(1) and 3(4), which does not support the argument it makes.

Eastern railroad appellants defend the order under Section 3(4) on the proposition that a connecting carrier is not such unless there is a "through route". Before the recent amendment of Section 3(4) that view had been taken in some cases before the commission. The amendment of Section 3(4) changes that.

Section 3(4) forbids any rate discrimination between connecting lines, and, by the recent amendment, defines "connecting lines." This definition includes appellee barge lines.

The Commission considered, as warranting its order under Section 3(4), matters which do not warrant it and which it had no right so to consider, matters which afford no rational basis for the order, under Section 3(4) as amended.

The order violates Section 2 of the Interstate Commerce Act.

The "unjust" discrimination forbidden by Section 2, there defined as arising from different charges for transportation rendered under "substantially similar circumstances and conditions," exists here. The discrimination in the rate for the transportation east from Chicago is

made against grain that has come in by barge and in favor of grain that has come in by rail, although it all came from the same origin. As to origin, the transportation east from Chicago is under identical conditions, with respect to grain subjected to the discriminatory treatment. There are no findings of any dissimilarities in circumstances and conditions in the rendering of the transportation service east from Chicago that warrant the discrimination against grain that has come in by barge, in favor of grain that has come in by rail. The commission, in sustaining the proposal under Section 2 relied on matters that it was not entitled to consider as a matter of law.

Reasonableness of a rate is not the test of its discriminatory character under Section 2 or 3; though a rate may be both unreasonable and discriminatory, as the proposed rates are.

The order is in violation of the National Transportation Policy.

The basis on which the Commission primarily supported the proposal was that the benefit of a lower water rate into Chicago can be set off against an increased rail going on east from Chicago. This sacrifices the inherent advantage to the public of low cost water transportation, with no finding to warrant that. No evidence addressed to the National Transportation Policy was heard. Such evidence, being offered, was rejected.

The Commission, in order to do its duty, should have disposed of the case under Section 6(11)b, and applied Section 15(7).

The District Court had jurisdiction to enjoin the order. The objections to it are held by this Court to be within the scope of judicial review, both as a matter of statutory construction and as a matter of constitutional principle.

ARGUMENT.

I.

The Rate Proposal Was in Violation of Section 3(4) of the Interstate Commerce Act as Amended.

Section 3(4) of the Act reads:

> "(4) All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to Part III." (As amended September 18, 1940—49 U. S. C. A. 3 (4) (Supplement.)

The prejudicial difference in treatment to which the ex-barge grain would be subjected by the proposal is not disputed by any appellant.

The Western line appellants make no attempt to justify the proposal under Section 3(4).

The brief for the Commission:

(a) Ignores the discrimination in favor of the ex-rail traffic (brief 52). As we have pointed out, ex-rail grain will be eligible for a proportional rate for the on-haul from Chicago; but ex-barge grain, though it came in from the same origin point, would be subjected to a higher rate for the on-haul.

(b) The Commission's brief says: "Prior to the

> Transportation Act of 1920, this court held that discrimination between connecting railroads forbidden by Section 3(4) of the Act to Regulate Commerce is a question of administrative fact and is of the same quality as discrimination and undue prejudice against persons and localities," citing *Pennsylvania Co. v. United States*, 236 U. S. 351, 361 (Brief 52, 53).

The case referred to was one in which this Court, affirming the District Court, refused to enjoin an order of the Commission; the Commission's order was one which compelled the Pennsylvania Railroad to give a connecting railroad switching facilities, that it was giving to other connecting railroads. That decision was correct; obviously it does not support the proposition for which the commission cites it.

The first paragraph of Section 3 of the earlier Act, under which that case was decided read, as quoted in that opinion:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." (Idem.)

In the course of the opinion, this Court, commenting on Section 3 of that Act, said:

> "This section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation, or locality; what is *such undue preference or advantage* is a question not of law but of fact." (Idem.) (Our emphasis.)

When the present case was decided Section 3(1) of the Interstate Commerce Act, as amended, read similarly, ex-

cept that Congress had added this sentence by the Transportation Act of 1940:

> "Provided, however, that *this paragraph* shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." (Our emphasis.) (Section 3(1), 49 U. S. C. A. 3(1).)

It is not upon Section 3(1) that we rely. This Court in the cited case paraphrased provisions of the first paragraph of the earlier act in saying that they presented questions of fact and not of law. And Congress later amended that language of that paragraph to say that the provisions of that paragraph did not apply to discrimination against the traffic of any other carrier. This was done as part of the general revision of the Interstate Commerce Act effected by The Transportation Act of 1940. At the same time Congress put Section 3(4) in the form in which we rely upon it; Section 3(4) as amended and not Section 3(1) applies here.

The provisions of other paragraphs of the earlier act (quoted in the opinion) dealing with inte -carrier discrimination as to rates, fares and charges, were not even involved in the cited case. The court said:

> "And, as we have said, the question of compensation is not here involved, and what compensation the Pennsylvania Company might require from the Rochester Company is not now to be determined." (Idem.)

—This Court's refusal in that case to pass on the Pennsylvania Company's contention that its mutual switching arrangements with other connecting lines would warrant a difference in charges, is not a decision that it did warrant such a difference. It is far from a decision that interline discrimination in rates, fares and charges never presents a question of law. It is not a decision that a discrimination in rates between connecting lines, whose admitted purpose is to drive the traffic off one and onto the other, does not

present a question of law. (R. 266.) It is especially not a decision that discrimination between carriers bringing the same commodity from the same point to the same reshipping point, and made to depend solely upon the circumstance that one is a common carrier by water, the other by rail, never presents a question of law. If the intent of the legislation is to permit that, then the intent of the legislation is to permit the rails to dictate who shall serve the public in the transportation of grain to Chicago. That is exactly what the witness for the rail proponents of their rate change said they meant to accomplish by their present rate proposal. (R. 266.) It is not disputed by any appellant that to a large extent at least, it will successfully accomplish it, the only finding of the commission and the only contention of its counsel being that it will not wholly *prohibit* the barges rail movement.[1]

It is difficult to find any meaning for Section 3(4) as amended, unless it was meant to lay down a rule of law, forbidding discrimination as to rates, fares and charges between connecting carriers. The commission did not find as a fact that there was no such discrimination. On the contrary, Division 2 held, as a matter of law, that

> "Under the Interstate Commerce Act as amended September 19, 1940, Section 3(1) of part one undue discrimination, prejudice or disadvantage by rail carriers to the traffic of any other carrier, by water for example, is not unlawful. Part III of the Act is substantially similar. *It follows* that the prejudice alleged by the barge line, even if it existed, is not unlawful." (Our emphasis.) (R. 18; 246 I. C. C. 353 at 356.)

It went on to say that the low barge rates had induced

1. Unlike Section 3(1), Section 3(4) makes no qualification as to what is "unjust", "undue", or "unreasonable", as to rate discrimination between connecting carriers. Rate discrimination between connecting carriers is unqualifiedly forbidden. Whether or not questions of what is "unjust", "undue", or "unreasonable", were questions of fact, no such questions arise under Section 3(4) as amended. If, as the argument for the Commission above quoted would suggest, the Commission treated the case as though such questions were decisive, it would amount to a further departure from the statute.

the rails to yield to the temptation of publishing low intrastate rates into Chicago, characterizing this as a breakdown of the interstate (rail) rate structure, and suggesting no way in which the rate proposal in question would remove that temptation from the rails. The way in which the rails said it was intended to work was to "drive this traffic off the water and back onto the rails."

The full commission made no finding supporting any conclusion that there was no discrimination. It did not find a breaking down the grain rate structure (and the finding of Division 2 on that point is to be deemed withdrawn). *Akron, C. & Y. Ry. Co. v. U. S.*, 261 U. S. 184, 203.

Its finding that the barge-rail movement would not be "prohibited" is not a finding that it was not injured and discriminated against. Its finding that ex-barge grain would be treated no worse than local grain or grain that had lost its transit privilege, or grain that came in on intrastate rates do not tend to show that there was no discrimination; it *was* treated worse than ex-rail grain of identical character from the same origins. Its finding that ex-barge grain would be treated no worse than ex-truck grain does not tend to show there was no discrimination against ex-barge grain in favor of the connecting rail carriers, and ignores the statute which does not forbid the rails to discriminate against ex-truck grain but does forbid them to discriminate against traffic of common carriers by water subject to Part III (Sec. 3(4)). Its finding predicated on "barge-rail combinations" is not a finding that there is no discrimination but the contrary; on no theory of the facts advanced by the Commission is the ex-barge grain on an equality with ex-rail grain for movement to Eastern Trunk Line and New England territory.

The commission's result is not supported by any finding of fact. It is rested upon a proposition of law:

"To adopt protestants' premise would mean that all

> proportional rates lower than local rates and differing from each other according to the origin of the commodity would have to be condemned." (R. 54.)

We do not find that appellants attempt to defend that proposition. We submit, it cannot be defended. There is no conflict in the record that this rate proposal was to cancel the existing proportional rates on ex-barge grain *whatever its origin*—continuing proportional rates on ex-rail grain, *whatever its origin*. Grain from the same origin would take the lower proportional, or not, depending solely on whether it came in by rail or by barge.

Turning to the argument made for the eastern rail appellants, their contention under Section 3(4), as amended, is that the barge carriers were not "connecting carriers," because there was no "through route." (Brief 55, *et seq.*) They cite no authority for this proposition. They concede that physical connection is unnecessary. (Brief 54.)

In the next preceding section of their argument but one they refer to *St. L. S. W. Ry. Co.* v. *U. S.*, 245 U. S. 136, for a definition of what is a through route.

Prior to the amendment of the Interstate Commerce Act (which *inter alia* enacted Part III and amended Section 3(4)) one group of carriers subject to the Commission's regulation were those "engaged in":

> "(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common contract, management, or arrangement for a continuous carriage or shipment;" etc. (41 Stat. 474; 49 U. S. C. A. 1.)

The Commission had held that the later provisions of Section 3(4) as they then stood forbidding interline discrimination, applied only to protect carriers subject to its jurisdiction. Division 2 refers to such decisions of the Commission (R. 18, 246 I. C. C. 353, 363) and then proceeds to say that discrimination against traffic of carriers by water is not unlawful under Section 3(1) of the Interstate

Commerce Act as amended in 1940 and that "it follows" that the prejudice alleged by the barge line is not unlawful; it then says immediately thereafter that:

> "This barge line has no common arrangement with respondents for a through route," etc. (R. 18; 246 I. C. C. 353, 363.)

Division 2 concludes, as quoted by the eastern rail appellants (Brief 57):

> "To now conclude that the suspended schedules should be found not justified would, in effect, be recognizing a common arrangement between the barge lines and the rail carriers for a continuous through route, despite the fact that the evidence definitely shows that none exists. A common arrangement cannot be inferred." (R. 18; 246 I. C. C. 353, 380.)

All this ignores the amendment of Section 3(4) effected by the Transportation Act of 1940. That amendment, after forbidding discrimination in rates between connecting lines, then defined connecting lines by a new sentence, as follows:

> "As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions *of this chapter or any common carrier by water subject to Part III.*" (Our emphasis.) (49 U. S. C. A. 3 supplement; 49 Stat. 607c, 722, Title I, Sec. 5(a). The Code transliterates "Part III" into "Section 12 of this Title," which is Part III of the Statute as enacted. Idem.)

This appellee (R. 1722, 1723; Sec. 309) and Inland Waterways Corporation are common carriers subject to Part III. There is no contrary contention.

Among other things, it would appear from the foregoing that the amendment of Section 3(4)* was aimed at the doctrine of the Commission excluding water-carriers from protection against inter-line discrimination.

* Which the Division and appellants ignore although they rely on the amendment of Section 3(1) effected by the same act, excluding the application of that other paragraph to interline discrimination.

The statutory definition of connecting line is explicit; and now includes not only common carriers subject to Part I—it also includes "any common carrier by water subject to Part III." This provision is new. If it meant that there must also be a through route (as the Commission formerly required) no effect whatever is given to the amendment. That is not defensible. It will be noted that learned counsel for the Commission does not join the eastern railroads in this position.

Summarizing: We contend: That under Section 3(4) the question is not whether there is an "unjust discrimination" but whether there is a "discrimination." The Commission undertook to justify the discrimination. This, we think, was its first error of law. No intercarrier rate discrimination (Section 3(4) as amended) can be "just" or "reasonable." All intercarrier rate discrimination is forbidden.

Assuming we are wrong in this, and that the Commission had power to look for facts that in its opinion would justify interline rate discrimination—notwithstanding Congress had forbidden interline rate discrimination—we also and equally contend that the facts found by the Commission do not justify the discrimination. For example, the injury to the barge-rail movement is not denied. The undisputed evidence precludes denial.* The avowed purpose of the rate proposal was to transform the barge-rail movement into an all-rail movement. (R. 266.)

It is familiar (and not denied) that failure by the Commission to find facts supporting its conclusion constitutes an error of law

Florida v. *U. S.*, 282 U. S. 194, 215.

U. S. v. *B. & O. R. Co.*, 293 U. S. 454, 464.

U. S. v. *Chicago, M. & St. P. R. Co.*, 294 U. S. 499.

* The record is summarized in the brief for Inland Waterways Corporation, *et al.*, Appendix B, pp. 117, *et seq.*

The extensive findings of matters that did not justify the discrimination show that the Commission treated, as justifying the discrimination, matters that do not do so. It is familiar (and not denied) that for the Commission to take account of matters that cannot lawfully influence its judgment is an error of law.

Mitchell v. *U. S.*, 313 U. S. 80.

Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S. 242.

Interstate Commerce Commission v. *Stickney*, 215 U. S. 98.

Ann Arbor R. Co. v. *U. S.*, 281 U. S. 658, 666.

Anchor Coal Co. v. *U. S.*, 25 F. (2d) 462, 471.

Examples of this are, treatment of this case as though it were a proposal to adjust proportional rates to the length and nature of the inbound haul, whereas it is a proposal to abolish them for all ex-barge traffic, regardless of the length of the inbound haul; the Commission's observations as to local, truck and intrastate grain and grain that has lost its transit privileges.

In these connections we refer to two other matters considered by the Commission, which we submit neither justify the discrimination nor constitute matters the Commission had any right to consider in that connection.

First, the Commission says that the existing proportionals violate Section 4. The answer to this is well made in the brief for Inland Waterways, *et al.*, and we do not reproduce the discussion of that brief here merely to avoid repetition. We do wish to add however that we further contend that assuming (not conceding) a violation of Section 4 in the established proportional rates which were not in issue, that does not justify discrimination in a new rate proposal. To so hold would be to hold that Section 4 cannot be obeyed without treading on Section 3(4).

Second, the argument of some of the appellants is ex-

tensive that the Commission did not violate Section 2 in taking into account antecedent transportation conditions prior to the arrival at the rate break point. That argument is advanced in defending the Commission against the charge of having violated Section 2 (not Section 3(4)), and will be considered in that connection.

We also submit that there is no evidence fairly supporting even the insufficient finding that the barge-rail movement would not be prohibited. This rate proposal was made with intent to drive the inbound traffic off the water. The record is detailed in Appendix B of the brief for the Inland Waterways Corporation.

The only answer of any appellant that we find are (1) that a witness said that the continuance of the barge-rail movement would depend on supply and demand; (2) to some central territory destinations "barge-rail combinations" would still be lower than all-rail.

In rejoinder: (1) the statement of a witness that the barge-rail movement would depend on supply and demand does not get to the conclusion argued from it. That is a generalization; the precise question is whether there would be a demand. The evidence is overwhelming and uncontradicted that there would not be. (Cf. Appendix B of Brief for Inland Waterways Corporation.) (2) The fact that the "barge-rail combination" would still be lower to some central territory destinations equally falls short of the appellants' desired conclusion, when the facts stated by Chairman Eastman and not disputed are taken into account. (R. 70, 71.) It is evident therefrom, as he states, that the "barge-rail combinations" theory "will not enable the ex-barge grain to move from Chicago at the local rate." (R. 70.) The farmer gets the benefit of the low inbound barge rate (R. 18; 246 I. C. C. 353, 361); it is the buyer on the Chicago market who must reckon with the higher local rate for the on-haul (R. 71, said Appendix B).

The record discloses no shipper who can offset a low inbound rate against a higher outbound rate.

Taking all the facts into consideration, the circumstances relied on by appellants do not rationally support the conclusion that the proposals would not actually prohibit the barge-rail movement.

Rochester Tel. Corp. v. U. S., 307 U. S. 125, 146.

The Rate Proposal in Question Violated Section 2 of the Interstate Commerce Act.

The western railroads make no defense of the Commission's order in this connection.

Section 2 forbids "unjust discrimination," and defines what that means. The contention of appellants is that the rates for the on-haul could be higher on ex-barge grain, because a difference in antecedent transportation conditions created a situation in which the on-service was not "under substantially similar circumstances and conditions," which is the essential language pointed to by appellants in the definition of "unjust discrimination" prohibited by Section 2.

In the first place, the antecedent condition chiefly stressed by the Commission with reference to the inbound haul was the length of the inbound haul. We have heretofore pointed out that when the inbound haul is to be from the same origin, the discrimination is nevertheless made against ex-barge grain in favor of other grain in the rate for the on-haul. It is impossible on the undisputed facts to justify the discrimination by that "antecedent transportation condition." The rate will be different when that antecedent condition is identical.

While the Commission did not say that when the inbound haul is over a low-cost water route that would constitute an antecedent transportation condition such that the on-haul

would not be under substantially similar circumstances and conditions, the appellants argue the case as though it had said that.

If that were an essential finding, the Commission did not make it, and the order errs in point of law for the failure to make it. (Cas. cit.)

But if the Commission had made it, as appellants wish to assume, it would constitute matter that the Commission was lawfully entitled to consider as justification of the discrimination; it would not justify the discrimination.

The Commission itself has been particularly clear on this. In *Chattanooga Packet Co.* v. *I. C. R. R. Co.* (1915) 33 I. C. C. 384, (by the entire Commission) the defendant rail line restricting its proportional rates against ex-water traffic was dealt with as follows (p. 392):

> "The fact that the proportional rates to and from the Ohio River are compelled by competition can have no bearing upon our determination of the issue of unjust discrimination. The 'like circumstances and conditions' referred to in Section 2 of the act are those which arise within the field of haulage, and do not include competition. *Wight* v. *U. S.*, 167 U. S. 512; *I. C. C* v. *A. M. R. R. Co.*, 168 U. S. 144. The shippers who desire to avail themselves of the water-and-rail route must be given equal treatment with those who ship all-rail. Any discrimination which exists must not exceed that which is warranted by the differences in circumstances and conditions *of the haul over defendant's lines.*

Further (p. 393):

> "We are of the opinion and find that, by restricting their proportional rates to traffic routed over their southern rail connections, defendants are unjustly discriminating against complainant and against shippers who desire to route their goods over complainant's boat line."

See *accord*:

Raw Sugar, New Orleans to Gramercy and Reserve La. (1935) 206 I. C. C. 231.

Bascom Co. v. *A. T. & S. F. Ry. Co.*, 17 I. C. C. 354.

Rosenbaum Bros. v. *L. & N. R. R. Co.*, 22 I. C. C. 62.

Birkett Mills v. *D. L. & W. R. R. Co.*, 123 I. C. C. 63.

Ex-River Grain and Products to Mississippi Valley, 177 I. C. C. 206.

Restriction of Proportional Rates, 161 I. C. C. 113.

The same principle has been announced by this court in many cases.

The decision of this court cited by the Commission in the opinion above quoted is *Wight* v. *U. S.*, 167 U. S. 512, 518. Other cases are *I. C. C.* v. *Delaware L. & W. R. Co.*, 220 U. S. 235, 253-4 (where the court stated the principle in much broader terms than necessary to condemn the present rate proposal); *Atchison, Topeka & Santa Fe Ry. Co.* v. *U. S.*, 279 U. S. 768. Cf. *T. & P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197

Appellants confuse this principle by the suggestion that it is inconsistent with the existence of proportional rates. But to maintain proportional rates lower than local rates on the principle that the commodity to which the proportional rates apply has had a prior movement to the reshipping point, is perfectly consistent with a principal that forbids withholding proportional rates entirely from commodities that have had an inbound haul over one type of carrier, while they are given to those whose inbound haul was by a favored type of carrier.

Appellants likewise confuse this situation by arguing that the rates were reasonable and that therefore it was proper to require ex-barge traffic to pay them. If the ex-rail and

ex-lake traffic were also required to pay the local rates, the situation would be different. The answer to the question whether a rate is reasonable (under Section 1) does not control the answer to the questions whether it is discriminatory, (Sec. 3(4)) or unjustly discriminatory (Sec. 2).

> *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 145 U. S. 263, 277.
>
> *American Express Co.* v. *So. Dakota ex rel. etc.*, 244 U. S. 617, 624.
>
> *U. S.* v. *I. C. R. R. Co.*, 263 U. S. 515, 524.

A rate may be at once unreasonable under Section 1 and discriminatory under Section 2. We think this rate proposal was subject to both criticisms. But that is not always true, and the tests are not the same.

> "Moreover, to make an additional charge for having brought merchandise into a city, if it should afterwards be shipped out, is on its face unreasonable. And it is discriminatory to make that additional charge only if the outbound shipment is over one of several railroads."
>
> *Atchison T. & S. F. Ry. Co.* v. *U. S.*, 279 U. S. 768, 773.

In the same case this court said further:

> "When the outbound shipment from Kansas City is made the grain goes forward on a new bill of lading. Obviously, this practice cannot convert the independent shipment of grain from Kansas City to the gulf via the Southern into a through movement from Dodge City to the gulf." (*Idem*, 779.)

The Rate Proposal in Question Was in Violation of the National Transportation Policy.

A new National Transportation Policy was enacted by the Transportation Act of 1940.*

It directs the Commission, in mandatory language to administer all sections of the act so as to accomplish the purposes there stated.

One such purpose is to preserve the inherent advantages of the various forms of transportation, including water transportation. The great and obvious inherent advantage of water transportation is low cost. So to administer the act as to destroy or diminish water transportation in this trade on account of its low cost, is not to administer the provisions of Section 2 and 3(4) as to preserve that inherent advantage.

The policy of Congress is to foster water transportation on account of its low cost. That advantage is now being realized by producers of grain to whom water transportation is available. (R. 18, 246 I. C. C. 353, 361-362.) Large sums of public money have been invested in developing water transportation in order to achieve that result. After Congress has made that investment in order to secure the inherent advantage of water transportation, and directed its Commission in mandatory language so to administer the Interstate Commerce Act as to preserve it, at the same time amending the act so as to protect common carriers by water against interline rail rate discrimination, then the Commission does not obey the statute when it approves a rate proposal which is designed and will operate to diminish water transportation, on the theory that for such water-rail movement as survives, the low cost of the inbound barge rate partly offsets the increased outbound rail rate on the traffic.

* Preceding Section 1

This is true even though the water transportation were not diminished at all, and even though the shippers of grain in this trade could offset a higher outbound rail rate against a lower rail rate. For the cost of getting the grain from country origin through the reshipping market and on to eastern destination would be increased. That increase represents so much sacrifice of the economy of water transportation on the inbound haul. It is to cancel the economic advantage of low cost water transportation into Chicago by increasing the cost of rail transportation out of Chicago. That is an economic waste; it is *pro tanto* throwing away the national resource of cheap water transport.

> "The proposed schedules will result in increase in the barge-rail combinations of 1.5 to 7.5 cents to central territory, and in a uniform increase of 8.5 cents to trunk line territory." (Report of the Commission, R. 52.)

This is a palpable sacrifice of the inherent advantage of water transportation. In view of the mandatory requirement that the Commission shall so administer the act as to preserve the inherent advantages of the various forms of transportation, it was squarely contrary to the mandate of congress, unless it appears from some other finding of the Commission that this sacrifice of one purpose of the Act was reasonably required in order to achieve some other purpose of the Act that was more urgent or more seriously involved. There is no such finding; it does not appear from any word of their report that the majority of the Commission ever addressed itself to that inquiry.

It appears, on the contrary, that the taking of evidence was completed in January, 1940, before the National Transportation Policy had been enacted by Congress (in September, 1940). Even had the Commission made findings of fact sustaining the rate proposal under the policy of Congress they would not be a proper exercise of administrative

discretion, for they would be based on evidence that was not addressed to the National Transportation Policy and could not have been so directed, for it was evidence taken before that policy was enacted. This appellee (specially appearing, inasmuch as he could not submit to the record so made before issues to which he asked to present evidence existed) asked the Commission for leave to present evidence addressed to the new National Transportation Policy and the Commission refused to receive such evidence. (R. 1724, 1725; 95-100; original record 172.) Counsel for the Commission and the other appellants now argue to this Court that the National Transportation Policy was effected (and Section 3 (4) respected.) It is true that the order necessarily involved a determination of those questions. It is also true that it was entered without taking evidence addressed to those issues. (Findings 31, 32; R. 1675.) There is palpable legal error when an administrative agency acts without taking evidence addressed to the statutory standards which Congress has established for its action.

This is especially pertinent when, as here, the action of the Commission is defended on assertions of the latitude of administrative discretion. Even if we were to assume (contrary to what we submit to be the fact) that the evidence taken warranted the order under the new National Transportation Policy, no one can say that that record would have been the same if it had been made with reference to the then unenacted National Transportation Policy. No one can say that the evidence this appellee sought to introduce would not have been at least entitled to administrative consideration under that policy. Administrative discretion is not extended to permit the administrators of Congressional policy to act upon a record that was made without reference to that policy, and to decline to hear and consider the evidence that is addressed to that policy.

The policy which the Commission in its brief here ad-

vances as derived from the Act of Congress and as warranting the order made is the policy to foster competition between carriers. Obvious facts overlooked by this contention are that this proposal was designed to destroy water competition; that the inbound water carriers who would be hurt are not in competition on the movement east from Chicago to which alone the rate proposal applied; and that (whether the rail movement east from Chicago or the whole movement from country origin to destination is regarded) the effect of this "competitive" proposal is not to lower rates to the public but to increase them—whereas such policy as may be found to foster competition, contemplates competition calculated to improve, not injure, the situation of the shipping public. The National Transportation policy inhibits "destructive competitive practices." If the Commission indeed acted on the theory it argues here as to a policy to foster competition, including this "competitive" practice that will increase the cost of transportation, it manifestly misapplied the law. The finding of fact is that this "competitive" practice here involved (if it is properly called such) will increase the cost of transportation to the public; the theory on which the Commission discusses the increase in the rail rate east from Chicago involves canceling *pro tanto* the advantage of the low cost water haul into Chicago by an increase in the rail rate for the on-haul.

IV.

The Commission Committed an Error of Law in Failing to Dispose of the Case Under Section 6(11)b and in Failing to Hold the Eastern Railroad Appellants to the Burden of Proof Imposed on Them by Section 15(7) of the Act.

The position of this appellee is identical on this point with that of Inland Waterways Corporation, and to save repetition reference is made to the brief for that appellee, pages 81 and following.

V.

The District Court Had Jurisdiction to Enjoin the Order.

It will have appeared from what has been said that objections to the Commission's order were of a sort that this court has repeatedly held to be within the scope of judicial review.

Since our position is similar to that of Inland Waterways Corporation on this point we refer to and rely on the argument made in the brief for that appellee, without repeating it. (Brief 34 and following.)

We wish to add these considerations:

Western rail lines (not the Commission, nor the eastern rail proponents of the rate change in question) contend that appellees were bound to submit to the Commission's order until they could carry through a complaint proceeding. Without repeating the decisive reply to that contention in the brief for Inland Waterways Corporation, we point out that the practical consequences of that suggestion to this appellee would be especially disastrous, since the barge grain trade is the only transportation in which the Commission has permitted him to engage under the Transportation Act of 1940. (R. 1724.) It is but reasonable to suppose that in enacting Section 15(7), under which the Commission held its hearing and entered the order complained of, it was intended to protect all affected parties against the consequences of applying increased rail rates while complaint proceedings were carried on. Those consequences would be especially severe to this appellee, since the only transportation permitted him is barge transportation, and the grain he transports goes generally to interstate and foreign destinations. (R. 1722.)

We also suggest that "administrative discretion" upon which appellants so heavily rely, does not mean discretion

in the administrator to make the standard for his own action; that it does not include discretion to act except under and in conformity with the standard or rule prescribed by Congress; that it is not validly exercised without findings of fact that disclose that it acted upon the statutory policy, based on a fair hearing, which includes reception and consideration of evidence that is addressed to the standard, and opportunity to know what that standard is when the evidence is offered. These propositions rest also on familiar propositions of constitutional government.

Atchison, Topeka & Santa Fe Ry. Co. v. *U. S.*, 284 U. S. 248, 262.

Mahler v. *Eby*, 264 U. S. 32, 44.

Wichita Railroad & Light Co. v. *Public Utilities Commission*, 260 U. S. 48, 59.

Florida v. *U. S.*, 282 U. S. 194, 215.

In the *Atchison* case, 284 U. S. 248, *supra*, this court held that a change in the economic level after the evidence was taken required the Commission to take further evidence, saying (p. 262):

> "In the discharge of its duty, a fair hearing is a fundamental requirement."

I. C. C. v. *Louisville & N. R. R. Co.*, 227 U. S. 88, was cited (that case holds that the Commission cannot reach decisions on its own knowledge, but can act only on evidence). An order of the District Court declining to enjoin the enforcement of the Commission's order was reversed.

It would seem that a change in the economic level is no more potent a reason for further hearing than a complete overhauling of the statutory situation as to the regulation of carriers by water, which included an amendment of the

provisions of the act relied on and a new National Transportation Policy, and a new statutory status for appellee.[1]

The absence of findings of fact that would sustain this rate proposal under the National Transportation Policy and Section 3(4); the presence of findings that would condemn it thereunder, and extensive discussion of matters that the Commission had no right to consider as sustaining it thereunder; the failure to take any evidence addressed to that policy or to Section 3(4); the refusal to hear the evidence that was addressed to that policy and to Section 3(4); and the acceptance of evidence taken before those enactments and without reference thereto, when no one knew that those were issues, as a basis for an order thereunder—all seem to force appellants to carry administrative discretion into new and hitherto forbidden territory. They also refute the suggestion of the eastern railways that no constitutional questions are raised: they are raised. (R. 93, 94.) If the act is construed to warrant what the Commission did here, then the act delegates legislative power and appellee was denied the fair hearing essential to due process of law.

Conclusion.

The order of the specially constituted District Court should be sustained.

Respectfully submitted,

LUTHER M. WALTER,
EDWARD B. HAYES,
For A. L. Mechling, doing business as A. L. Mechling Barge Line, Appellee.

EDWARD B. HAYES,
Of Counsel.

1. Appellant's new status as a regulated common carrier subject to Part III made a difference, both with respect to the application to him of Section 3(4) (cf. the last sentence thereof) and seems to have been a matter that commissioners would consider under Section 4 and Section 6(11)b. Cf. Headnote of the majority report of Division 2 (R. 18, 246 I. C. C. 353) and dissent of Commissioner Alldredge. (R. 381.)

of. 5, 9, 10

SUPREME COURT OF THE UNITED STATES.

No. 175.—October Term, 1942.

The Interstate Commerce Commission, The Baltimore and Ohio Railroad Company, et al., Appellants, *vs.* Inland Waterways Corporation, et al. } On Appeal from the District Court of the United States for the Northern District of Illinois.

[June 14, 1943.]

Mr. Justice Jackson delivered the opinion of the Court.

By schedules filed with the Interstate Commerce Commission to become effective October 15, 1939, the appellant eastern railroads[1] sought to deny grain arriving at Chicago by barge over the Illinois Waterways the privilege of moving out of Chicago by rail on "proportional" rates applicable to competing grain arriving at Chicago by lake steamer or rail. The only other rates on which the ex-barge grain could move eastward by rail from Chicago were "local" rates, which were in all cases higher than the existing "proportional" rates. The proposed schedules were protested by barge lines and others desirous of maintaining the existing proportionals as to ex-barge grain.

Understanding of the controversy thus precipitated and the consequent litigation which has brought it to this Court requires a statement of the rather complicated rate structure to which the proposed schedules related.

The proposed schedules applied to grain, grain products and grain by-products, but for convenience we refer to them all as "grain." They dealt not only with grain coming by barge *via* the Illinois Waterways to Chicago, but also with grain so arriving at Peoria, Illinois, St. Louis, Missouri, and other related rate-break points. Chicago is illustrative of all, and for convenience we shall follow the practice employed by the parties in briefs and argument, and confine our discussion to it.

[1] Baltimore & Ohio Railroad Company, New York Central Railroad Company, New York, Chicago and St. Louis Railroad Company, Pennsylvania Railroad Company, Erie Railroad Company, and the Chesapeake & Ohio Railway Company.

Grain originating at Chicago, grain brought there by truck, or by rail under intrastate rates, and grain which had forfeited its transit privileges, moved eastward by rail from Chicago on local rates. Their validity as such has not been questioned in this case.

Grain originating at certain places distant from Chicago had the privilege, however, of moving eastward from Chicago by rail on the lower proportional rates, although it came to rest at Chicago for marketing or processing. These "proportionals" varied according to the region of origin or the region of destination; and, in some instances, according to both.

"Official Territory" lies east of Chicago, and is divided into "Central Territory," "Trunk-line Territory," and "New England Territory." Central Territory lies west of a line drawn through Pittsburgh and Buffalo. To this territory there were three different sets of proportionals, set with reference to the territory of origin.

Grain originating at certain points in Illinois moved out of Chicago by rail to Central Territory on "Illinois Re-Shipping" proportionals, which, however, did not apply to ex-barge grain and were not affected by the proposed schedules.

Grain originating in "Northwest Territory" moved out of Chicago by rail to Central Territory on "Northwest" proportionals, which were in some instances higher, and in others lower, than the Illinois Re-Shipping proportionals. As first published, these proportionals applied only to grain originating in Northwest Territory, which comprises generally North Dakota, South Dakota, Minnesota, Wisconsin, the upper peninsula of Michigan, Montana, Wyoming, Idaho, Oregon, Washington, and certain Canadian provinces. The Northwest proportionals were originally and have continued to be applicable on grain arriving at Chicago by lake. In 1932 the Northwest proportionals were amended to make them apply to shipments which "arrived by boat line at Chicago . . ." At the time this wording was put into the tariffs the only waterborne grain to which they applied was that arriving from the Northwest by boat over the Great Lakes. The Commission has decided that the effect of this amendment was to make the Northwest proportionals apply to grain arriving by barge over the Illinois Waterways, which were opened in the following year, 1933; and we accept its determination of this issue. While shipping points along the Waterways vary from 57.5 to 209.9 miles in dis-

tance from Chicago, some grain arriving there by barge originated at points as far beyond as Kansas City and St. Louis. The Northwest proportionals were the only ones which applied to ex-barge grain moving out of Chicago by rail to Central Territory, and the proposed schedules cancelled them as to such grain.

Grain brought by rail from "Trans-Mississippi Territory," which included, among other places, Kansas City and St. Louis, moved out of Chicago to Central Territory on "Trans-Mississippi" proportionals, which had been set by the Commission 3 cents lower than the Northwest proportionals, in order to equalize the Twin Cities with Kansas City. The Trans-Mississippi proportionals did not apply to grain coming from these points by barge, and therefore such grain had to pay a higher rate for the outbound haul than was required of grain coming from them by rail. No complaint has been made, however, of this; and the appellees have been content to assert that they are entitled to the Northwest proportionals as to such grain.

"Trunk-line Territory" lies between Central Territory and New England Territory, which comprises the New England States. To Trunk-Line and New England Territories the proportionals did not vary with the point of origin of the grain. These proportionals applied to grain coming to Chicago by barge over the Illinois Waterways, and the proposed schedules cancelled them as to such grain. The existing schedules provided that "in no case shall the combination through rate to and from the re-shipping point *via* rail be less than the local rate from the re-shipping point to destination, the difference necessary to protect the local rate from the re-shipping point to be added to the re-shipping rate therefrom." No such provision was made with respect to the barge-rail traffic, and the Commission found accordingly that "the barge-rail rates are far below the local rates from the re-shipping points in contravention of the fourth-section rule,[2] while the all-rail rates are in strict conformity with that rule."

When the proposed schedules were filed with the Commission, that body, acting pursuant to its authority under § 15(7) of the

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2 § 4. "(1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall

Act,[3] suspended them for the allowable period of seven months and entered upon a hearing of their lawfulness. The last testimony was heard, and the record in the case closed, on January 26, 1940. On September 18, 1940, the President approved the

not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section, but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *And provided further*, That tariffs proposing rates subject to the provisions of this paragraph may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice." 54 Stat. 904, 49 U. S. C. § 4 (1).

[3] 44 Stat. 1447 as amended by 54 Stat. 912, 49 U. S. C. § 15(7), reading:

"Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or change for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

Transportation Act of 1940.[4] Thereafter the appellee Inland Waterways Corporation requested the Commission to dispose of the proceeding in the light of the new Act. On July 31, 1941, Division 2 of the Commission found that "the proportional rates here in issue have never been applicable on this barge traffic moving on unfiled rates," and that "the schedules under suspension are not shown to be unlawful." It announced that an order would be entered vacating the already expired order of

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[4] The provisions of the Interstate Commerce Act particularly relied upon by appellees which were amended or added by the Transportation Act of 1940 read as follows:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." 54 Stat. 899.

"§ 3(1). It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." 54 Stat. 902, 49 U. S. C. § 3(1).

"§ 3(4). All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III." 54 Stat. 903, 49 U. S. C. § 3(4).

"Part III, § 307(e) . . . Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act." 54 Stat. 935, 49 U. S. C. § 905(e).

suspension and discontinuing the proceedings.[5] When the period of compulsory suspension ended, the carriers had voluntarily continued the suspension.

In its petition for rehearing and reconsideration of this report the Inland Waterways Corporation asserted that the Commission had permitted discrimination against a connecting line forbidden by § 3(4) of the Interstate Commerce Act as amended by the Transportation Act of 1940.[6] It suggested that the Commission fix the existing proportional rates as the proper ones, stating that: "Theoretically, the Commission is not limited to a choice between the unlawful proposed rates and the present rates, but may, upon an adequate record, prescribe some different basis of rates for the future. Actually, no different proposal has been introduced which could support a different basis of rates than those presently in effect. That fact, however, cannot possibly militate to justify the proposed rates, but could only compel the postponement of any change in the present tariffs pending further hearing, and the introduction of a lawful proposal."[7]

The decision of the whole Commission on reconsideration was announced on December 1, 1941.[8] In it the Commission took official notice that certain of the protestant barge carriers had attained common carrier status under the Act, and stated that "no useful purpose would be served by further hearing or reargument."[9] The Commission reviewed the existing rate structure and the probable effects of the proposed changes in operation as contrasted to the effects of denying them, and said:

"The proposed schedules will not prohibit the movement by barge-rail even to trunk-line territory, their principal commercial

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[5] 246 I. C. C. 353.

[6] See footnote 4, *supra*, for the text of this provision.

[7] Petitions for reconsideration were also filed by "Chicago protestants," operating elevators and dealing in grain at Chicago; Illinois Agricultural Association, representing shippers located on the Illinois Waterways; Finnegan Warehouse Company, operating an elevator on the Waterways; and the United States Department of Agriculture. These petitions are not incorporated in the record, but it appears that the action of Division 2 was assailed by these protestants under § 3(1), set out in footnote 4.

[8] 248 I. C. C. 307.

[9] From the report of the Commission it appears that the Inland Waterways Corporation was the only one asking further hearings. It stated that further hearings could be useful only to establish the information of which the Commission took official notice, and suggested that the Commission avoid the necessity for them by taking such notice.

effects being to reduce the profits of the Chicago elevator operators. . . .[10]

"Protestants maintain that the proposed schedules will be unreasonable, unjustly discriminatory, and unduly prejudicial . . . and unduly preferential . . . . This is based primarily on the fact that under the proposed schedules the ex-barge rates will be higher than the ex-rail or ex-lake rates, although in each instance the physical carriage beyond the reshipping point is substantially the same. But the latter is also true of local grain, grain brought in by truck, or by rail under intrastate rates, or grain which has forfeited its transit privileges. To adopt protestants' premise would mean that all proportional rates lower than local rates and differing from each other according to the origin of the commodity would have to be condemned. As pointed out by the division, reshipping or proportional rates are in their essence balances of through rates. Such balances are, of course, determined by the measure of the in-bound and through rates and properly may vary according to the relative length and nature of the in-bound and through service. It follows that the protestants' allegations cannot be sustained in this proceeding, although in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations.

"The facts of record, as detailed by the division and summarized herein, clearly show that respondents are justified under section 1 in treating the ex-barge traffic the same as local or ex-truck traffic and that the proposed schedules cannot be condemned as unlawful under sections 2 and 3 of the act.

"On reconsideration of the record in the light of the petitions and replies thereto and our prior decisions, we find that:

"(1) The proportional rates here under consideration were legally applicable on the ex-barge traffic where the so-called policing provisions were strictly complied with.

"(2) The proposed schedules are shown to be just and reasonable and are not shown to be otherwise unlawful."

Accordingly the Commission ordered:

"That the order heretofore entered in this proceeding, suspending the operation of the schedules enumerated and described in

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10 Even under the proposed schedules, the combination barge-rail rates are in many instances lower than the all-rail rates. Much grain that arrives at Chicago is consumed locally or is shipped out by lake. In the case of grain arriving by rail, such disposition often leaves the elevator with a "transit balance" as a result of which ex-barge grain may move eastward by rail on the proportional rates.

The District Court apparently did not find that there was no evidence to support the Commission's finding that it was the elevator operator, rather than the farmer, who is affected by the proposed schedules. In any event, the foregoing would seem sufficient support for the Commission's finding, and we do not suppose that the finding makes any difference in the law to be applied,

said order, be, and it is hereby, vacated and set aside as of December 22, 1941, and that this proceeding be discontinued."

After the Commission had announced its decision and on December 12, 1941, appellant Mechling Barge Lines sought to intervene on the ground that since the record had been closed it had become a regular common carrier by water of grain by barge to Chicago and other rate-break points, and was entitled to the protection afforded to such carriers by the Transportation Act of 1940. It urged that the decision be set aside and, if it should be thought necessary to this end, that it be given an opportunity to introduce evidence. This was the first offer to assist the Commission in any way in the establishment of proportional rates fixed with reference to the ex-barge grain. No specific suggestion was made, however, as to the amount of such rates or as to the evidence which would be introduced in support. This petition was denied by the Commission on January 21, 1942.

On January 16, 1942, the Inland Waterways Corporation had filed its complaint in the United States District Court seeking an injunction against the enforcement of the Commission's order. Various other parties were allowed to intervene in the case as plaintiffs and defendants. The Attorney General did not participate, giving as his reason the existence of a conflict in litigation between coordinate agencies of the Government, the Agricultural Adjustment Administration and the Interstate Commerce Commission. The opinion of the specially constituted three-judge District Court was announced on April 16, 1942.[11] It stated that "The Interstate Commerce Commission took no evidence addressed to the issue whether the rate proposal in question is in violation of Section 3(4) of the Interstate Commerce Act, as amended by the Transportation Act of 1940, or contrary to the National Transportation Policy enacted by the last said act; but the Interstate Commerce Commission passed upon the legality of said rate proposal upon evidence taken without reference to such issues and before they existed." It concluded that the order was of a "character which this Court is authorized to enjoin and set aside," and should be set aside on the ground that it "discriminates against water competition by the users of barges." It decreed that the Commission's order vacating the already-expired suspension of the proposed schedules and discontinuing the proceed-

[11] 44 F. Supp. 368.

ings be annulled and that the railroads be "permanently enjoined . . . from acting upon the authority of the aforesaid order."

The case is here on appeal.[12]

In the proceedings before the Commission the protestants pitched their case upon two propositions: (1) To deny the exbarge grain the benefit of proportionals sought to be cancelled was necessarily unlawful since the physical carriage beyond Chicago was substantially the same, no matter where the grain originated; (2) Since denial of that benefit was necessarily unlawful, the Commission was bound to maintain the *status quo* by cancelling the proposed schedules and thus perpetuating the existing rate structure, whatever might be its defects.

As the Commission correctly observed with reference to the first contention, "to adopt protestants' premise would mean that all proportional rates lower than local rates and differing from each other according to the origin of the commodity would have to be condemned."

Proportional rates so differing and lower than local rates for like outbound transportation have a long history, antedating the Interstate Commerce Act itself. Long hauls have generally been thought entitled to move at a rate less than the sum of the rates for local or short hauls between intermediate points. The practice of routing commodities such as grain to centers for marketing and processing has been widespread and often a necessary feature of the process of distribution. In many instances stopovers for marketing and processing have not been considered as disrupting the continuity of transportation to more distant points, and consequently the grain has been allowed to move on at a rate lower than the outbound rate on grain originating locally and not from a distance.[13] To get the outbound business competing carriers frequently would offer rates similarly computed.[14] Proportional rates established on this reasoning[15] have become deeply embedded in

[12] Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220, 28 U. S. C. §§ 47, 47a; § 238 of the Judicial Code as amended, 28 U. S. C. § 345.

[13] E. g., Unlawful Rates in Trans. Cotton by K. C., M. & B. R. R. Co., 8 I. C. C. 121; Central Yellow Pine Association v. V., S. & P. R. Co., 10 I. C. C. 193.

[14] Berry, A Study of Proportional Rates, 10 I. C. C. Practitioner's Journal 545, 602.

[15] For the variety of practices so sustained, see Locklin, Economics of Transportation (1935), pp. 122-123, 629-631.

the transportation system of the country, and have been approved by the Interstate Commerce Commission,[16] by the federal courts, this one included;[17] and, so far as it has spoken on the subject, by Congress itself.[18] We see no reason for repudiating them now.

Having pointed out the error of the protestants' basic contention, the Commission stated that: "It follows that the protestants' allegations cannot be sustained in this proceeding, although in a proper proceeding we might prescribe proportional rates on this ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations." Pending the commencement of such a proceeding it ordered the vacation of the already-expired order of suspension and ordered the discontinuance of the instant proceedings.

Despite this statement, much of the argument in this Court has proceeded upon the assumption that the Commission's order resulted from its belief and findings that the discrepancies between the proportional rates not cancelled in the proposed schedules and the local rates as applied to ex-barge grain were in all respects lawful, and that it actually approved or prescribed a rate structure containing such discrepancies. We do not so understand the action of the Commission.

True, the Commission stated that the railroads "are justified under section 1 in treating the ex-barge traffic the same as local or ex-truck traffic," and found that "the proposed schedules are shown to be just and reasonable." But this does not constitute a finding that the rates were lawful; they "may lie within the zone of reasonableness and yet result in undue prejudice" or otherwise violate the Act.[19] The Commission also stated that the facts of record show that "the proposed schedules cannot be condemned as unlawful under sections 2 and 3 of the act."[20] But this statement

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[16] See the dissenting opinion of Chairman Eastman in the present case. Other cases are collected in Berry, *supra*, footnote 14.

[17] Atchison, T. & S. F. Ry. Co. v. United States, 279 U. S. 768; Great Northern Ry. Co. v. Sullivan, 294 U. S. 458; cf. Board of Trade v. United States, 314 U. S. 534.

[18] § 11 of the Panama Canal Act, 1912, 37 Stat. 566, now 49 U. S. C. § 6(11), set out in its present form in footnote 25, *infra*. Cf. Sen. Rept No. 433, 76th Cong., 1st Sess., p. 10.

[19] United States v. Illinois Central R. R. Co., 263 U. S. 515, 524.

[20] § 2, 49 U. S. C. § 2, reads as follows:

"If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter,

followed immediately upon the Commission's statement that from its conclusion that protestants' claim as a matter of right to the existing proportionals was erroneous, "It follows that the protestants' allegations cannot be sustained in this proceeding, although in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations." Read in the context, we think it meant only that the proposed schedules could not be struck down upon the erroneous view advanced by the protestants. The finding of the Commission that the proposed schedules "are not shown to be otherwise unlawful" is, we think, to be similarly read. This form of finding has been held by the Commission not to constitute an approval or a prescription of the rates under suspension.[21] Since the Commission refused to approve or prescribe them, they stand only as carrier-made rates which, under the Commission's decisions, leaves them open to possible recovery of reparations.[22] Like the Commission, we also refrain from approving or prescribing them.

The case had been developed before the Commission upon the theory that the proposed schedules must stand or fall in their entirety. There has been no suggestion, nor is it apparent, that it would have been feasible for the Commission to pick and choose among the items in the existing and proposed schedules.

To perpetuate the existing rate structure by sustaining the District Court's injunction would entail numerous and serious violations of § 4(1).[23] Under that rate structure, ex-barge grain moved from Illinois River points to Baltimore, New York and Boston at combination rates lower than the local rates for domestic grain from all points in Central Territory west of a line running south from Bay City, Michigan, through Fort Wayne and Indian-

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than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

The pertinent provisions of § 3 are set forth in footnote 4, *supra*.

[21] Standard Packing Co. v. Union Pacific R. Co., 190 I. C. C. 433; Parkersburg Rig & Reel Co. v. Chicago & N. W. Ry. Co., 198 I. C. C. 709; William Kelly Milling Co. v. Atchison, T. & S. F. Ry. Co., 211 I. C. C. 53; Kansas City Ice Co. v. Atchison, T. & S. F. Ry. Co., 215 I. C. C. 616, 619; Halifax Coal & Wood Co. v. Atlantic & Y. Ry. Co., 219 I. C. C. 594; Moorehead Cotton Mills Co. v. Chesapeake & O. Ry. Co., 231 I. C. C. 437.

[22] See cases cited in footnote 21, *supra*. Compare Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 284 U. S. 370; 50 Yale Law Journal 714.

[23] See footnote 2, *supra*, for the text.

apolis, Indiana. So also did the ex-barge grain move out at combination rates lower than local export rates on grain from all points in Central Territory west of a line running southwardly and south along the Indiana-Ohio line; and lower than the local export rates on corn from all points in Central Territory west of a line between Paynesville and East Liverpool, Ohio, near the Pennsylvania line. Unlike the barge-rail rate, the all-rail-rates are, as the Commission has found, in strict conformity with § 4(1). Congress by the Transportation Act of 1940 amended § 4(1), but nowhere in the Act or in its legislative history is there any suggestion that from the mere fact that grain moving from beyond Chicago to New York travels by barge for the 60-mile leg of its journey to Chicago—less than one percent of the total haul—it shall as matter of law be entitled to a rate from beyond Chicago to the seaboard less than that from the Pennsylvania line to the seaboard.[24]

Appellees make no better showing with respect to the effect of the injunction on the rate structure west of Chicago. To sustain the injunction would require a holding that grain originating 60 miles from Chicago must as matter of law be given the benefit of proportionals fixed with reference to grain from the Northwest Territory, embracing points in Canada and as far west in the United States as Washington and the Dakotas. In addition to the disparity in distances, there is the further fact that the grain from the Northwest is predominately wheat, while that from the territory served by the barge lines is predominately corn from Illinois. Nothing in the Interstate Commerce Act as amended by the Transportation Act of 1940, or in the statements of even the most ardent Congressional champions of water transportation, affords the slightest warrant for a decision that the Commission must treat as legally identical such widely disparate factual situations.

Finally it is claimed that the Commission was obliged to continue the § 15(7) proceedings and establish special proportionals for the barge lines under § 6(11) of the Act.[25] This duty is claimed by appellees to derive from the provision of § 15(7) that after

[24] Indeed, the legislative history shows that the water interests vigorously championed the long-and-short-haul clause as a measure necessary to prevent ruinous competition.

[25] § 6(11) provides:

"When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the trans-

suspension and hearing of a proposed rate change the Commission "*may* make such order with reference thereto as would be proper in a proceeding initiated after it had become effective." (Italics supplied). The construction contended for would have the effect either of imposing a practically impossible burden upon the Commission or of making resort to the Commission's powers under § 15(7) so rare as to make such powers of little practical significance. Suspension cases are very numerous, and in many of them the construction contended for would require the Commission to "readjust the entire rate structure of an important section of the country."[26] We have already noted the breadth of the rate structure here involved. To require the present proceedings to be continued until proportionals can be set with reference to the barge transportation would hardly be within the intention of Congress, which in terms made the Commission's power discretionary, and legislated upon the assumption, formed after much experimentation with the period of suspension,[27] that

portation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction otherwise given by this chapter:

" . . . . (b) To establish proportional rates or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water." 49 U. S. C. § 6(11).

[26] Salt from Louisiana Mines to Chicago, 69 I. C. C. 312, 313. See also, Livestock to Eastern Destinations, 156 I. C. C. 498.

[27] In the original form provided by § 12 of the Mann-Elkins Act, 1910, 36 Stat. 539, 552, the period of suspension was not to exceed 120 days, with the proviso that if the hearing could not be concluded within that period the Commission might in its discretion extend the time for a further period not exceeding six months. § 4 of the Commission Division Act, 1917, 40 Stat. 270, 272, provided that until January 1, 1920, Commission approval must be had for the filing of increased rates. By § 418 of the Transportation Act of 1920, 41 Stat. 456, 486, the initial suspension period of 120 days was retained, but the permissible period of further suspension was shortened to thirty days. "The increased size of the Commission and its divisional organization rendered the shortening of the suspension period feasible." 1 Sharfman, The Interstate Commerce Commission, 203. The Commission was authorized, however, to require the carrier to keep accurate account in detail of all amounts received by reason of an increase going into effect at the end of the period of suspension, and to require at the end of the hearing that they be refunded. The present provisions with regard to the Commission's power of suspensation and of requiring an accounting were enacted by § 2 of the Mayton-Newfield Act, 1927, 44 Stat. 1446, 1447.

suspension cases could normally be carried to completion within seven months and to that end commanded in § 15(7) that "the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

The record had been closed on January 26, 1940, when the last testimony was heard. The Transportation Act of 1940 was not enacted until September 18. At the time the evidence was taken it was not clear whether some of the barge lines operating in the water way were common carriers, and none had obtained certificates of convenience and necessity from the Commission as now required. They had not filed reports with the Commission from which the results of their own operations might be judged, and they had not filed tariffs showing their rates. All of this has since changed. The applicable law has changed. The issues raised by the position of the parties did not call for a fixing of new combination rates, for it was contended barge grain was entitled to the existing proportionals.

The policy provisions of the Transportation Act of 1940, as well as the specific statutory provisions, provide only standards of considerable generality and some overlapping. It requires administration to "recognize and preserve the inherent advantages of each"—rail, water, and motor transport. It also seeks "sound economic conditions" for all kinds of transportation.[28] For more than a year after the enactment of this Act, and until after the Commission had finally disposed of the case, appellees showed no disposition to make proposals or to develop a record upon the basis of which the Commission might prescribe rates in view of their particular circumstances and under the provisions of the Act designed with reference to them. Instead they relied upon the erroneous view that they were by law entitled to the fortuitous and in many respects unlawful benefits of the existing rate structure. Their nearly four years of litigation have not, however, been in vain, for during all this time they have managed to keep the proposed schedules in abeyance—first by compulsory suspension for the allowable period of 7 months at the hands of the Commission, then by the railroads' voluntary act at the expiration of that period, and finally by the compulsion of the District Court's injunction.

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[28] See footnote 4, *supra*.

Our function does not permit us either to prescribe or approve rates, and our decision carries no implication of approval of any rates here involved. Nor are we at liberty to prescribe general attitudes the Commission must adopt towards the exercise of discretion left to it rather than to courts. We decide only whether the Commission has acted within the power delegated to it by law. We are of opinion that it has and that the decision of the court below must be

Reversed.

MR. JUSTICE RUTLEDGE did not participate in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 175.—October Term, 1942.

The Interstate Commerce Commission, the Baltimore and Ohio Railroad Company, et al., Appellants, *vs.* Inland Waterways Corporation, et al. } On Appeal from the District Court of the United States for the Northern District of Ohio.

[June 14, 1943.]

Mr. Justice Black, dissenting.

The issue in this case is whether the farmers and shippers of the middle west can be compelled by the Interstate Commerce Commission and the railroads to use high priced rail instead of low priced barge transportation for the shipment of grain to the east. I agree that, in the words of Division 2 of the Commission, "this record is replete with complexities and technicalities" which have almost, but I think not quite, successfully obscured that simple issue. The District Court, which held that the Interstate Commerce Commission's order "discriminates against water competition by the users of barges" understood the issue.[1] The railroads, which proposed the increase in the cost to barge shippers, also understood the issue as is shown by the frank statement of their representative at the Commission hearing: "We made this proposal, as I have stated several times, and filed these tariffs with the hope that we could drive this business off of the water and back onto the rails where it belongs. . . . We are not in love with water transportation . . . and we believe that we are entitled to that grain business." From behind a verbal camouflage of "complexities and technicalities" there emerges one single easily understandable question: Railroads pick up grain in Chicago which may be brought there by rail, lake transport, or inland waterway barge. Is it lawful for a railroad to deprive midwestern grain farmers and shippers of the benefits of cheap barge transportation by charging a higher tariff for re-shipment of grain originally transported to Chicago by barge than the same railroad

[1] 44 F. Supp. 368, 375.

charges for re-shipment of the same grain from Chicago to the same places when the grain is brought to the re-shipping point by rail or by lake?

The record shows, and it was admitted at the bar, that barges can by reason of their inherent advantages carry grain more cheaply than railroads. The Commission found that inbound grain barge rates to Chicago ranged from 2.75 to 4.5 cents per hundred pounds for hauls of distances of 57 to 200 miles as contrasted with rail rates for the same distances ranging from 9.5 to 13 cents. Grain can thus be brought to Chicago far more cheaply by barge than by rail. However, only a small proportion of the grain which is sent to Chicago stays in that city, and the new tariff approved by the Commission and by this Court will charge so much more for the shipment of grain to the east when the grain is brought to Chicago by barge than is charged for shipment of grain brought in by rail that this natural advantage of barge transportation will be destroyed. Hereafter it will cost 8.5 cents more to ship ex-barge than ex-rail grain to the east.[2] Under the existing rates, a farmer can ship his grain from Kansas City to New York by barge to Chicago and rail from Chicago to New York for 4.625 cents less than if he uses rail transport all the way from Kansas City to New York. Under the new schedule approved today, that differential is wiped out, and he will hereafter pay 3.875 more to ship by barge and rail than if he ships rail all the way. This order in substance gives ex-barge traffic a 4 cent disadvantage where it previously had a 4 cent advantage. Similar penalties are imposed upon shippers who use barge lines in Missouri, Iowa, and Illinois. The Commission, as its sole finding on the impact of the rates on the barge lines, found that the new rates would not "prohibit" barge shipments. Such a finding is irrelevant. A rate need not be prohibitive to be discriminatory. The new rate is manifestly intended to and will have the effect of transferring most of the barge traffic to the railroads, since shippers will not customarily pay 10% more to ship by barge-rail than by rail alone.[3]

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[2] The figure given is the increase in cost of shipment to the best eastern market. The cost varies, depending on the destination of the grain.

[3] The new rates for shipment from Chicago to the east of course do not "prohibit" barge shipments to Chicago since the small amount of grain consumed in that city will not be affected by the outgoing rates, and some

Certain questions may be put to one side without elaborate discussion. The new rates cannot be justified on a theory of distinction between long and short hauls since the distances covered are substantially the same whether barge-rail or all rail transportation is used. The Court asserts that the existing all rail rates are lawful under the long and short haul clauses, while the existing barge-rail rates are unlawful. But there is nothing in the long and short haul clause which requires that shippers by rail to Chicago from points in Illinois, Iowa, Kansas, and Missouri must be granted a low rate for shipment beyond Chicago which is denied to those who ship into Chicago by barge. Nor is the fact that the rates directly affected by the new tariff are "proportional" of any significance.[4] A through rate may be invalid because of one factor only of the combination of rates which make it up, "and that factor may be a proportional rate."[5] The only issue to be decided is whether the barge shipper shipping from a given point to Chicago should be given any different proportional rate than rail shippers shipping from the same point to Chicago for equal service out of Chicago, and, for reasons to be set forth below, I find no justification for such a discrimination.[6]

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grain can still be carried to the east by lake transportation for so much of the year as the lakes are open to traffic.

The Court quotes the finding of the Commission that "the proposed schedules are not prohibitive" and that their principal effect will be to reduce the profits of the Chicago elevator operators. If the schedules operate unfairly, as I think they do, it is immaterial whether the farmers or the elevator operators bear the burden of the unfairness; but the Court in relying on this finding pays little regard to the fact that the court below found as a fact that the saving from barge transportation "accrues to the producer" and "does not accrue to the Chicago elevator operator." Unless the Court is willing, as apparently it is not, to re-examine the evidence and to conclude that the court below is in error, we must take the facts as they are given to us by the district court. In any case, I think the district court was correct.

[4] "A through rate is ordinarily lower than the combination of the local rates. When a through rate is made by combination of rates for intermediate distances the rate for the later link in the shipment is, when lower than the local, spoken of as a proportional rate." Atchison T. & S. F. Ry. v. United States, 279 U. S. 768, 771.

[5] *Ibid.*, 776.

[6] The Commission and the Court refer to the fact that ex-barge rates are now equal to ex-truck rates. This is irrelevant. If there is a discrimination against truck shippers, the remedy is an improvement of their situation, not a destruction of barge shipping. In the words of Chairman Eastman in his dissenting opinion, "My tentative opinion upon it is that where the movement by truck is from territory from which grain can be moved by rail or by water to Chicago subject to the application of the reshipping rates eastbound, the failure to apply such rates to the grain brought in by truck does result in violation of sections 2 and 3, provided adequate provisions for the identification and policing of such shipments are practicable and enforceable."

There is no factual issue here on which we are bound to accept the Commission's judgment as we were in *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344. Here we have a rate revision which can serve no conceivable purpose except to force shippers to use railroads instead of barge lines. Reasonable persons may differ as to the wisdom of such a policy, but not as to the certainty of its result; and, as will be shown, Congress has made the policy judgment and has flatly forbidden the Commission to do what it has done. The situation is similar to *Mitchell* v. *United States*, 313 U. S. 80, 97, in which the Commission sought to shelter a flatly forbidden discrimination behind the shield of expertise. There, too, we were cited to the *Chicago Heights* case and our many other decisions upholding the right of administrative agencies to make factual judgments. We replied that "On the facts here presented, there is no room, as the Government properly says, for administrative or expert judgment with respect to practical difficulties. It is enough that the discrimination shown was palpably unjust and forbidden by the Act." Such I think should be our answer here.

This tariff is an unjust discrimination within the meaning of § 2 of the Interstate Commerce Act, 49 U. S. C. § 2, which prohibits a carrier from demanding a charge either higher or lower than is charged by any other person for doing for him "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." Many decisions make clear that this section does in fact require a real equality. *Interstate Commerce Commission* v. *Baltimore & Ohio Railway Co.*, 225 U. S. 326; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768. The Commission counters with a contention that here there is "a dissimilarity of conditions prior to the rendering of the transportation service for which the charge in issue is assessed." True there is a difference, if only one, in the conditions prior to the rendering of the service from Chicago to the east. The difference is *solely* that one class of grain moves in to Chicago by barge and another moves in by other means; and this is a ground not of legitimate distinction, but of unfair discrimination. The discrimination would be no worse if the benefits of the cheap through rates were given only to shippers on a favored railroad coming into Chicago, and not to other shippers by rail. *Atchison, T. & S. F. Ry. Co.* v. *United States*, *supra*, 773. Here all circumstances and condi-

tions are substantially similar, and the Court ought to require the Commission to obey the law by following its own previously announced rule in *Chattanooga Packet Co.* v. *I. C. R. R. Co.*, 33 I. C. C. 384, 392, 393, in which the Commission said: "If carriers are permitted to apply higher rates for the same service on traffic routed over connecting water lines than on traffic via the all-rail connections, they will be in a position to destroy all water competition and to deprive shippers of the advantage of their location upon navigable waters. . . . We are of the opinion and find that, by restricting their proportional rates to traffic routed over their southern rail connections, defendants are unjustly discriminating against complainant and against shippers who desire to route their goods over complainant's boat line."

The decision of the Commission also violates § 3(4) of the Interstate Commerce Act, 49 U. S. C. § 3(4), which under the 1940 amendment to the Interstate Commerce Act is applicable to the appellees, and which forbids carriers to "discriminate in their rates, fares, and charges between connecting lines." This section became applicable to the appellees in the course of the Commission's disposition of this case, but before its opinion was filed. This circumstance is not, as the Commission seems to have supposed, a reason for ignoring the section. No more obvious "discrimination in their rates, fares, and charges" can be imagined, particularly in the light of the general policy of the Transportation Act of 1940.

I think that approval of this tariff is a defiance of the Transportation Act of 1940. 54 Stat. 899. This Act declared it to be "the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each." Title I, § 1. The Act commands the Interstate Commerce Commission that "all of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." Congress, fearful, in the words of several members, that the Commission was "essentially a railroad minded body,"[7] took

[7] 84 Cong. Rec. 5965, 5883, 5880-81. Legislation similar in purpose to the 1940 Act was considered by Congressional committees in the 74th and subsequent Congresses. Opposition to legislation giving the Commission authority over water transportation came from representatives of the water shippers. A typical protest was made by Cleveland A. Newton, General Counsel, Mississippi Valley Association, in the hearings before the Committee on Merchant

every precaution to prevent discrimination against water carriers.[8]

Senators, particularly those from the midwestern states where the barge lines involved here were operating, were especially fearful that the Commission would do substantially what it has done in this case. They required repeated assurance by the Chairman of the Interstate Commerce Committee of the Senate that the bill was written in such manner that the Commission could not if it desired permit discrimination against water carriers. At great length the Chairman of that Committee explained to apprehensive Senators that the bill contained provisions in three different places which imposed upon the Commission the imperative duty of standing in constant opposition to discrimination against shippers by water.[9]

House Members shared the same fears. The first conference report was defeated in the House because it was believed that the bill did not offer adequate protection for water carriers against hostile Interstate Commerce Commission action.[10] A proponent

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Marine and Fisheries, House of Representatives, 74th Cong., 2d Sess., on H. R. 5379: "This bill if enacted into law will place water carriers along the coast and upon our inland rivers under the absolute domination and control of the Interstate Commerce Commission. That Commission was created to regulate, conserve, and control railways. It is a railway-regulating agency. It naturally has the railway viewpoint, and past experience convinces us that the Commission, as now constituted, is railway-minded and that it would not be in the public interest to place water services under its domination and control. . . . We have observed the performance of the Commission in the past, under a comprehensive declaration of policy enacted by Congress, and that experience, we regret to say, has not inspired confidence." Hearings, p. 471.

8 "Mr. Lucas: . . . Under the bill, as I understand it, the Interstate Commerce Commission would have the power, and it would be its duty, to fix rates on the Illinois River with respect to the transportation of that wheat and corn. Would it be possible for the Interstate Commerce Commission to fix the rate the same as the railroad rate from that point to St. Louis?

"Mr. Wheeler: Not if the Commission does its duty, because the bill specifically provides that it must take into consideration the inherent advantages of the water carrier. Everyone agrees that goods can be shipped more cheaply by water than by rail." 84 Cong. Rec. 5879.

The following Senators and Representatives, among others, either required assurance that the Commission would not discriminate against water carriers or expressed the conviction that under the statement of policy, the Commission would be unable to discriminate against water carriers: Senators Austin, Clark of Missouri, Connally, Ellender, Lucas, Miller, McNary, Norris, Pepper, Shipstead, Truman, and Wheeler; Representatives Bland, Bulwinkle, Crosser, Culkin, Halleck, Lea, Pierce of Oregon, Sparkman, and Wadsworth.

9 84 Cong. Rec. 6125-6128.

10 The first conference report was rejected by the House on May 9, 1940, 86 Cong. Rec. 5886. The second report was accepted on Aug. 12, 1940, 86 Cong. Rec. 10193.

of the bill told the House that "It is not fair to suggest, in my opinion, that the Commission and the courts will not look to this declaration of policy whenever they are called upon to make such construction of the statute and application of it . . . The specific provisions of the bill carry out the declaration of policy. The courts and commissions will recognize that. . . ."[11] Defending the policy provisions as a complete protection against Commission action antagonistic to barge transportation, another sponsor of the bill, opposing a safeguarding amendment, declared that to consider it necessary "You will have to further assume that the Interstate Commerce Commission will not enforce it. You will have to assume that if a case goes to the courts, the courts will neither construe nor enforce the provisions of this policy."[12] As I see it, the Commission in this case has declined to enforce Congress's policy and the Court has failed to construe and enforce the Act as Congress clearly intended it should.

This is not all. The first conference report having been defeated, the second conference report brought in changes intended to offer more protection to water carriers. The conferees reported that: "This measure will place upon the Interstate Commerce Commission, not only the power, but the duty, to protect and foster water transportation and preserve its inherent advantages."[13] As a closing, clinching argument intended to persuade the House that the Commission would be fair to water carriers, the statement of Commissioner Eastman (who dissented from the order of the Commission here) was quoted. Eastman assured the Congressmen interested in water transportation that certain provisions of the bill "coupled with the admonition in the declaration of policy in section 1 that the provisions of the act be so administered as to recognize and preserve the inherent advantages of each mode of transportation, will afford adequate protection in this respect. If experience should show that further protection is needed, contrary to our expectation, Congress can amend the act, but such a restriction as is now proposed is, we believe, both unnecessary and undesirable."[14]

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11 84 Cong. Rec. 9865.

12 84 Cong. Rec. 9863.

13 86 Cong. Rec. 10172.

14 86 Cong. Rec. 10191. In his dissenting opinion, Chairman Eastman said: "The report states that the 'proposed schedules will not prohibit the movement by barge-rail even to trunk line territory, their principal commercial

The final statement of the last proponent of the 1940 Act, spoken just before the vote was taken on the second conference report, were these: "There is nothing whatever in the pending measure which could by any fair interpretation be regarded as unjust to water transportation or to any other kind of transportation." The speaker then read the policy provisions of § 1 and asked: "How much plainer could language be than that is? It is crystal clear that there is no basis in the bill for the apprehension expressed by those opposed to the measure."[15]

Although these proceedings were not initiated under the 1940 Act,[16] the Commission should have felt itself bound by that congressional expression of policy. Yet the legislative history just recited makes it clear that the Commission has flagrantly flouted the express mandate of Congress. It is said, however, that the Commission reserves the right to take further action in a "proper proceeding" in which it "*might* prescribe proportional rates [on the ex-barge traffic] or joint barge-rail rates lower than the combinations." At some future day the Commission may correct this discrimination. But the day for Commission action was the day this case was decided, and the day for action by this Court is now. The Commission is not bound by the technical procedures of the common law, and it should not strain to avoid the enforcement of congressional will because of the formal fashion in which questions are presented to it. In this proceeding it was the Commission's duty "to protect and maintain a transportation system free from partiality to particular shippers. The Commission acted in its capacity as a public agency" and was obligated to carry out "duties imposed upon it by Congress in the interest of shippers generally, the national transportation system and the public interest." *United States* v. *Trucking Co.*,

effect being to reduce the profit of the Chicago elevator operators.' I do not so understand the evidence. . . . As I understand it, the effect of the proposed schedule, unless the prices paid to the farmers whose grain is barged are reduced, will be to limit the outlet of the ex barge grain to local consumption in Chicago and to the lake and lake rail routes to eastern points."

15 86 Cong. Rec. 10192.

16 The 1940 Act gave the Commission jurisdiction to regulate water transportation directly. Here the same effect is achieved under the Commission's other powers by a tariff aimed at shippers who have previously used water transportation. For the background and nature of the 1940 Act see Eastman, The Transportation Problem, 30 Amer. Econ. Rev. 124; Stein, Federal Regulation of Water Carriers, 16 Jour. Land and Pub. Util. Econ. 478; Harbeson, The Transportation Act of 1940, 17 *ibid.* 291; Regulation of Water Carriers, 50 Yale L. Jour. 654.

supra, 354. The fact that this was not a formal proceeding to fix proportional rates under § 6(11)(b) did not detract from the Commission's powers. *Chicago R. I. & P. R. Co.* v. *United States*, 274 U. S. 28, 36; *United States* v. *New York Railroad Co.*, 272 U. S. 457, 462. The Commission itself in cases where the command of Congress was far less emphatic than here, has stated that an investigation and suspension proceeding such as this one "opens for consideration the lawfulness of the suspended rate under all provisions of the act." Sugar From Gulf Coast Port Groups To Northern Points, 234 I. C. C. 247, 251. "The reproach of dealing with the matter piecemeal" is incurred by the Commission here as it was in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510. It cannot, with due regard to its duty, shift responsibility "from the shoulders of the present to the shoulders of the days to come." Here, as in that case, postponement serves to leave "this particular carrier helpless in the interval."[17]

Congressman Bland, who opposed the 1940 Act on the ground that it lacked sufficient safeguards to prevent action by the Commission hostile to water transportation called attention to the procedural delays in rate cases before that body, delays which he declared would be used to strangle financially weak water carriers, forcing them to "yield or transfer their operation to other streams." He pointed out this "would mean the death of water carriers;" that the railroads knew how to obtain delay and knew the disastrous consequences that would follow to their competitors; that railroads "seek to profit" by procedural delay; and that the diversity of their interests and extent of their revenues was so great that they could survive delays which would be unendurable for competitors.[18] The Congressman was a good observer and a sound prophet.

The judgment of the District Court enjoining enforcement of this order was correct and should be affirmed.

Mr. Justice Douglas and Mr. Justice Murphy join in this opinion.

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[17] The Court interprets the Commission's order as leaving open the right of the shippers affected to bring actions for reparations for injuries suffered under the new rates. This will bring small practical comfort to the barge lines since the shippers will be unlikely to ship by barge when the price of every shipment is dependent on future legal proceedings. The barge lines, "helpless in the interval" pending new legal proceedings, risk serious financial injury, if not bankruptcy. While the shippers can ship by barge now and sue later, they are presumably interested in buying transportation, not lawsuits.

[18] 86 Cong. Rec. 10181.